Filed 2/22/05 P. v. Forest CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESS ALLEN FOREST, SR.,

Defendant and Appellant.

F044151

(Super. Ct. No. 1038788)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. John G. Whiteside, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

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Jess Allen Forest, Sr., was convicted of two counts of continuous sexual abuse of a child and related charges. (Pen. Code, § 288.5.)[1] He argues the trial court erred in

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[1] All further statutory references are to the Penal Code unless otherwise stated.

permitting the prosecutor to ask him if he had suffered a misdemeanor conviction and in imposing an aggravated sentence based on facts not found true by the jury. (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531].) He also argues he received ineffective assistance of counsel. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Forest was charged with two counts of continuous sexual abuse of a child (§ 288.5), one count of child molestation (§ 288, subd. (c)(1)), and one count of dissuading a victim from testifying by threats of force (§ 136.1, subd. (c)).[2]

Forest's stepdaughter, K., and his daughter, A., testified to sexual abuse that lasted at least one year and included at least five incidents of molestation each. The jury convicted Forest of each charged offense.

The trial court sentenced Forest to 21 years in prison, which represents an aggravated term of 16 years for one count of continuous sexual abuse of a child, a consecutive four-year term for the second count of sexual abuse of a child, and a consecutive one-year term for dissuading a witness from testifying. The trial court imposed a concurrent two-year term for the child molestation count.

DISCUSSION

I. The Misdemeanor Conviction

Both A. and K. testified they did not report the abuse sooner because they were afraid of Forest. Both testified they saw Forest physically abuse their mother, their brother, or both. The children's mother confirmed she had been abused by Forest "more

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[2] The information also charged a section 667.61, subdivision (b) enhancement on each count of continuous sexual abuse. The People dismissed this enhancement during trial.

than once," and that A. and K. saw a pattern of abuse, followed by separation and ultimately reconciliation.

Forest confirmed on direct examination that there were "three or four" instances of violence between the children's mother and himself, with the last confrontation occurring on "Mother's Day of [1997]." He also admitted that K. and A. may have seen him strike their mother. The following questions were posed during cross-examination:

> "[PROSECUTOR:] There were occasions during your relationship with [the children's mother] up until you said Mother's Day of 1997, where she and the kids moved out of the house at times; is that right?
>
> "[FOREST:] Yes.
>
> "[PROSECUTOR:] And that was because you have been -- you were violent with her -- [¶]…[¶]
>
> "[FOREST]: Not [at] all.
>
> "[PROSECUTOR]: Well, let's take the Mother's Day incident in '97. That's something that there was a misdemeanor conviction for domestic violence on your part; right? [¶]…[¶]
>
> "[FOREST]: Yes."

Forest argues the trial court erred in overruling his objection to the last question. He admits misdemeanor spousal abuse (§ 273.5), the crime of which Forest was convicted, is a crime of moral turpitude that may be used for impeachment purposes. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) He argues instead, that because he suffered a misdemeanor conviction, only the underlying facts were admissible, not the conviction itself. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300.)

We agree there was error, but conclude it is not reasonably probable that Forest would have obtained a different verdict had the error not been made. (*People v. Castro* (1985) 38 Cal.3d 301, 319; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Forest's propensity for violence was well documented during trial. K., A., and their mother testified to instances of domestic violence. Forest also admitted such conduct. Thus, it

hardly could have shocked the jury that Forest had suffered such a conviction. Moreover, the prosecutor did not refer to the misdemeanor conviction in his closing argument. The only time the conviction is mentioned is in the portion of cross-examination quoted above. Accordingly, reversal is not required.

II. Ineffective Assistance of Counsel

One of the witnesses at trial was Sheriff's Deputy Tori Hughes, who had interviewed K. during the initial investigation. One of the jurors recognized Hughes when he saw her in the hall during a break. The juror described "one night back in college" in approximately 1994 or 1995 when he met Hughes at a party and the two ended up kissing and "kind of touching." The juror denied seeing Hughes either before or since that night, describing her as "practically a stranger." The juror also asserted he would be able to evaluate her testimony fairly.

After questioning, neither party moved to exclude the juror. Forest claims he received ineffective assistance of counsel from his attorney because of this failure.

The first element in a successful claim of ineffective assistance of counsel is to demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) Forest cannot meet this requirement.

Forest argues his attorney should have moved to dismiss the juror. Had counsel made such a motion, it would have been denied. A juror may be excused at any time for good cause. (§ 1089; Code Civ. Proc., § 233.) The determination of good cause lies within the discretion of the trial court, but the inability to perform the functions of a juror must appear in the record. (*People v. Williams* (2001) 25 Cal.4th 441, 448.)

While good cause cannot be defined precisely, it has been found to exist where a juror refuses to follow the trial court's instructions (*People v. Williams, supra,* 25 Cal.4th at pp. 447-448), where a juror is unable to understand simple concepts or remember events during deliberations (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1780), and

where a juror is untruthful and gives the trial court reason to suspect he or she has had contact with the defendant's family (*People v. Green* (1995) 31 Cal.App.4th 1001, 1012, reversed on other grounds in *Green v. White* (9th Cir. 2000) 232 F.3d 671, 678).

Forest cannot present any evidence to suggest that good cause existed for removal of this juror. The juror admitted not knowing Hughes's name and came forward as soon as he recognized her. Therefore, there is not evidence the juror was being untruthful.

The juror also stated he met Hughes only one time over seven years before the trial. He specifically denied any bias for or against Hughes. There simply were no grounds to excuse this juror. Had counsel made such a motion, it undoubtedly would have been denied. Counsel cannot be found ineffective for failing to make a motion that, if made, would have been denied.

III. The Aggravated Term

In a supplemental brief, Forest argues that the trial court violated his right to a jury trial pursuant to *Blakely v. Washington, supra,* 124 S.Ct. 2531, when it imposed an aggravated term. The trial court imposed an aggravated base term, finding the circumstances in aggravation outweighed the factors in mitigation. The circumstances in aggravation found by the trial court were that "The victim was particularly vulnerable, that the manner in which the crime was carried out indicates planning, sophistication and professionalism; that the Defendant took advantage of [a] position of trust or confidence to commence the offense; [and] he engaged in conduct which indicates he's a danger to society." (Cal. Rules of Court, rule 4.421(a)(3), (8), (11) & (b)(1).) Relying on *Blakely*, Forest argues these factors were not found true by the jury and cannot be used to increase his sentence.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the defendant pled guilty to several crimes related to a drunken shooting spree. The trial court increased his sentence, finding the shooting spree was racially motivated, a fact Apprendi denied and which the trial court found true by a preponderance of the evidence. (*Id*. at pp. 469-471.)

The Supreme Court concluded that other than a fact of a prior conviction, any fact that increases the prescribed statutory maximum penalty for a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) This result was based on the Fourteenth Amendment due process clause and the Sixth Amendment right to a jury trial. (*Id*. at pp. 476-478.) The court was careful to distinguish trial court discretion when choosing a sentence within a proscribed statutory range. "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. [Citation.]" (*Id*. at p 481.)

This issue was revisited in *Blakely*. Blakely pled guilty to second degree kidnapping of his wife. "In Washington, second-degree kidnaping is a class B felony. [Citation.] State law provides that '[n]o person convicted of a [class B] felony shall be punished by confinement … exceeding … a term of ten years.' [Citation.] Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a 'standard range' of 49 to 53 months. [Citations.] A judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.' [Citation.] The Act lists aggravating factors that justify such a departure …. Nevertheless, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.'" (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2535.) After hearing Blakely's estranged wife testify, the trial court imposed an exceptional sentence of 90 months because it determined that Blakely acted with "deliberate cruelty." (*Ibid*.)

The majority opinion stated the issue presented required application of *Apprendi* to Blakely's sentence. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2536.) "In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty.' The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. [Citation.] Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra,* 124 S.Ct. at p. 2537.)

The majority opinion concluded, "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring* [*v. Arizona* (2002) 536 U.S. 584]), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [¶] Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2538, fns. omitted.)

The most recent pronouncement on this issue is *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738]. The case presented two issues: First, did the federal

guidelines violate the holdings in *Apprendi* and *Blakely*? Second, if the answer to the first question is yes, what is the remedy?

Booker and Fanfan were convicted of unrelated drug offenses after separate jury trials. Booker's conviction and criminal history subjected him to a base sentence of 210 to 262 months. In a posttrial sentencing hearing, the trial court found facts that mandated a sentence of 360 months to life in prison. Booker was sentenced to the minimum 30-year sentence. Fanfan's conviction and criminal history subjected him to a maximum sentence of 78 months. In a posttrial sentencing hearing, the trial court found facts that authorized a sentence of 188 to 235 months. The trial court, relying on *Blakely*, refused to impose a sentence based on facts found in the posttrial sentencing hearing.

Unsurprisingly, the same five-justice majority that decided *Apprendi* and *Blakely*[3] concluded the federal sentencing guidelines, which closely mirrored the Washington sentencing scheme found unconstitutional in *Blakely*, violated a defendant's Sixth Amendment right to a jury trial.

> "This conclusion rests on the premise, common to both [the Washington and federal sentencing schemes], that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. [¶] If the [Federal Sentencing] Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. *We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.* [Citations.] Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act of 1984] the provisions that make the [Federal Sentencing] Guidelines binding on district judges;… *For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a*

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3 Justices Stevens, Scalia, Souter, Thomas and Ginsburg.

jury determination of the facts that the judge deems relevant." (*United States v. Booker, supra,* 125 S.Ct. at pp. 749-750, italics added.)

In responding to the dissent's argument that *Apprendi, Blakely,* and *Booker* extended the Sixth Amendment beyond traditional bounds, the majority pointed out the recent emphasis on enhancements that increased sentencing ranges. The majority argued that the effect of such enhancements "was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance. [¶] As the enhancements became greater, the jury's finding of the underlying crime became less significant." (*United States v. Booker, supra,* 125 S.Ct. at p. 751.)

This part of the opinion concluded, "Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 125 S.Ct. at p. 756.)

The second part of the opinion focused on the appropriate remedy once the federal sentencing guidelines were found to violate the Sixth Amendment. A different majority[4] concluded that two provisions of the federal sentencing guidelines must be "severed and excised" (*United States v. Booker, supra,* 125 S.Ct. at p. 756), making the federal sentencing guidelines "effectively advisory. It requires a sentencing court to consider [Federal Sentencing] Guidelines ranges, [citation], but it permits the court to tailor the sentence in light of other statutory concerns as well, [citation]." (*Id.* at p. 757.) This approach makes the federal sentencing guidelines "advisory while maintaining a strong

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4 Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Ginsburg and Breyer.

connection between the sentence imposed and the offender's real conduct -- a connection important to the increased uniformity of sentencing that Congress intended its [Federal Sentencing] Guidelines system to achieve." (*Ibid.*)

California's determinative sentencing law differs from the federal and Washington schemes because in California each crime is assigned a three-tier sentencing range. The midterm is presumed to be the proper sentence, unless mitigating factors suggest the lower or mitigated term is appropriate, or aggravating factors suggest the upper or aggravated term is appropriate. (§ 1170, subd. (b).)[5] California Rules of Court, rule 4.421 lists 11 nonexclusive factors relating to the crime and five nonexclusive factors relating to the defendant that may be considered as circumstances in aggravation. California Rules of Court, rule 4.423 lists nine nonexclusive factors relating to the crime and six nonexclusive factors relating to the defendant that may be considered as circumstances in mitigation. "Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind." (Advisory Com. com. (2004), Cal. Rules of Court, rule 4.420.) Accordingly, the trial court retains discretion to determine whether to impose the midterm, an aggravated term, or a mitigated term, regardless of the circumstances found applicable by the trial court. (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

California also has numerous sentencing enhancements that may increase a defendant's sentence beyond the three-tier range defined by statute, such as the use of a firearm during the commission of a crime. (See, e.g., § 12022.53.) Enhancements are

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5 Section 1170, subdivision (b) begins "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

required to be charged separately and proved to a jury beyond a reasonable doubt, or admitted by the defendant, thus complying with the mandates of *Apprendi* and *Blakely*. (See, e.g., §§ 1170.1, subd. (e), 12022.53, subd. (j).)

Apprendi did not cause significant concerns for California's determinate sentencing scheme because in California enhancements are pled separately and found by the trier of fact beyond a reasonable doubt.

Because of the broad language in *Blakely*, defendants have argued that California's determinate sentencing scheme violated their right to a jury trial for at least two reasons. Defendants have argued that aggravated and court-imposed consecutive sentences for multiple convictions violate *Blakely's* prohibition against imposing a sentence not authorized by the jury's verdict. Forest presents only the former issue.

Prior to *Booker*, the question of whether the decision to impose aggravated terms violated *Blakely* was subject to serious debate. Most courts that addressed the issue concluded that *Blakely* restricts the ability of a trial court to impose an aggravated sentence. (*People v. Herod* (Sept. 28, 2004, B167962 [nonpub. opn.]), review granted Dec. 1, 2004, S128835, briefing deferred pursuant to rule 29.1, Cal. Rules of Court; *People v. Barnes* (2004) 122 Cal.App.4th 858, review granted Dec. 15, 2004, S128931, briefing deferred pursuant to rule 29.1, Cal. Rules of Court; *People v. Butler* (Sept. 22, 2004, B167710 [nonpub. opn.], review granted Dec. 1, 2004, S128657, briefing deferred pursuant to rule 29.1, Cal. Rules of Court; *People v. Earley* (2004) 122 Cal.App.4th 542, review denied Nov. 10, 2004, S128423; *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted Dec. 1, 2004, S128771, briefing deferred pursuant to rule 29.1, Cal. Rules of Court.)

Other courts have held that an aggravated term may be imposed only if the sentence is imposed because of factors relating to the defendant's prior convictions (*People v. Sample* (2004) 122 Cal.App.4th 206, 224 [crime committed while on probation (Cal. Rules of Court, rule 4.421(b)(4))], review granted Dec. 1, 2004, S128561, briefing

deferred pursuant to rule 29.1, Cal. Rules of Court; *People v. George* (2004) 122 Cal.App.4th 419, 426 [same], review granted Dec. 15, 2004, S128582, briefing deferred pursuant to rule 29.1, Cal. Rules of Court), or the defendant has a long criminal history of increasing seriousness (*People v. Butler* (2004) 122 Cal.App.4th 910, 920-921, review granted Dec. 15, 2004, S129000, briefing deferred pursuant to rule 29.1, Cal. Rules of Court [held *Blakely* applies, but sentence did not need to be reversed because of defendant's lengthy and increasingly serious criminal history and an absence of mitigating factors (Cal. Rules of Court, rule 4.421(b)(2))]). Another court has held that imposition of an aggravated term is permissible when it is based on facts found by the jury to be true. (*People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369-1370, review granted Dec. 15, 2004, S129050, briefing deferred pursuant to rule 29.1, Cal. Rules of Court.)

Others argued that *Blakely* does not apply to imposition of an aggravated term. Justice Benke advanced this argument in *People v. Wagener* (2004) 123 Cal.App.4th 424, 430, review granted January 12, 2005, S129579, briefing deferred pursuant to rule 29.1, California Rules of Court, and in her dissent in *People v. Lemus, supra,* 122 Cal.App.4th at pp. 623-624. Justice Benke argues that *Blakely* does not apply to California's determinate sentencing system because the aggravated term is part of the range of permissible sentences prescribed by statute. She cites *Apprendi's* specific approval of such systems ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. [Citation.]" (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 481)). Since *Blakely* purports merely to apply *Apprendi* (*Blakely v. Washington, supra,* 124 S.Ct. at p.

2536), it logically follows that *Apprendi's* approval of the exercise of discretion when imposing aggravated terms survives *Blakely*.

These issues are before the California Supreme Court (*People v. Towne* (May 17, 2004, B166312 [nonpub. opn.]), review granted July 14, 2004, S125677, and *People v. Black* (June 1, 2004, F042592 [nonpub. opn.]), review granted July 28, 2004, S126182), and undoubtedly will make their way to the United States Supreme Court. We acknowledge that most of the cited cases have been accepted for review by the California Supreme Court and cannot be relied on as authority. In most instances the Supreme Court accepted the cases for review and deferred briefing until it decides *Towne* and *Black*. We cite them to point out the confusion caused by *Blakely*'s broad language.

We think that *Booker*, however, resolves the confusion caused by *Blakely* and establishes that California's determinate sentencing law does not violate a defendant's Sixth Amendment right to a jury trial.

First, the majority opinion written by Justice Stevens reaffirms that a trial court has discretion to impose sentences within a prescribed statutory range relying on facts not necessarily found true by the jury. We note that nothing in *Apprendi*, *Blakely*, or *Booker* suggests that a trial court does not have authority to choose a specific sentence within the initial range identified in each opinion.[6] It is only when the trial court exceeds the initial statutory range that a defendant's Sixth Amendment right is implicated.

Which brings us to our second point. We think the proper analysis of *Booker* establishes that *Apprendi* and *Blakely* were intended to apply to enhancements to a

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[6] Apprendi was subject to a sentence of 5 to 10 years; Blakely was subject to a sentence of 49 to 53 months; Booker was subject to a sentence of 210 to 262 months, and Fanfan was subject to a maximum sentence of 78 months.

sentence.[7] In other words, Justice Stevens clarified that the Sixth Amendment applies when an enhancement increases a defendant's sentence, but has no application when a sentence is imposed within a range of possible sentences. We also note that in each case it was the trial court that found the enhancement true, using the preponderance of the evidence standard.

Third, Justice Stevens's opinion acknowledged that the only constitutional defect to the federal sentencing guidelines was their mandatory nature. The remedy chosen by the majority of the Supreme Court was to give trial court's discretion in imposing a sentence, apparently, even if the sentence was within the enhanced range. Thus, all members of the United States Supreme Court agree that judicial discretion in sentencing does not violate the Constitution.

California's determinate sentencing law does not suffer the constitutional defects of the statutes addressed in *Apprendi, Blakely,* and *Booker.* A trial court in California has discretion to choose either a mitigated term, the midterm, or an aggravated term. When a trial court imposes an aggravated term, it is exercising discretion within a prescribed statutory range. A jury using the beyond-a-reasonable-doubt standard must find all enhancements to the sentence true. This is the type of system that we read *Booker* to require. Therefore, we reject Forest's argument that his Sixth Amendment right to a jury trial was violated when the trial court imposed an aggravated sentence.

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[7] In *Apprendi* the issue was a hate crime enhancement. In *Blakely* the enhancement was imposed because Blakely acted with deliberate cruelty. In *Booker* the enhancement was applied because of the quantity of illegal narcotics possessed by each defendant.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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GOMES, J.